Cinergy Corp.
221 East Fourth Street
P.O. Box 960
Cincinnati, OH 45201-0960
Tel 513.287.2456
Fax 513.287.2433

CHERYL M. FOLEY
Vice President, General Counsel
& Corporate Secretary

June 14, 1996

CINERGY.

Office of the Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D.C. 20554

Re: FCC 96-192, GC Docket No. 96-101
Notice of Proposed Rulemaking ("NPRM")

Dear Sir:

Cinergy Corp., a registered holding company under the Public Utility Holding Company Act of 1935 ("1935 Act"), submits the enclosed comments on the proposed regulations referred to above implementing new section 34(a)(1) of the 1935 Act. In addition to the original of our comments, we enclose nine copies in order that the Commissioners may receive personal copies thereof and otherwise to comply with the NPRM.

Very truly yours,

Cheryl M. Foley

Cheryl M. Foley

Comments of Cinergy Corp.
FCC 96-192, GC Docket No. 96-101

Cinergy Corp. ("Cinergy"), a registered holding company under the Public Utility Holding Company of 1935 ("1935 Act"), submits these comments in support of the proposed regulations to implement new section 34(a)(1) of the 1935 Act, as added by section 103 of the Telecommunications Act of 1996 ("Telecommunications Act").

Introduction

Section 34(a)(1) creates a class of "exempt telecommunications companies" ("ETCs") largely exempt from regulation under the 1935 Act. Before an entity can claim status as an ETC, the Federal Communications Commission ("FCC") must find that the conditions of section 34(a)(1) are satisfied. The FCC has proposed a simple procedure for ETC determination, under which applicants will briefly describe their planned activities and certify that they satisfy the specific statutory requirements and any applicable FCC regulations.

Cinergy commends the FCC's approach. As the Notice of Proposed Rulemaking makes clear, the FCC's responsibilities under section 34(a)(1) are limited to determining whether an applicant meets the express statutory requirements for status as an ETC. Neither the public interest nor the legislative purpose would be served if the application process were to become a regulatory barrier to participation in the telecommunications industry. Indeed, the Telecommunications Act was specifically intended to sweep away the regulatory constraints that had previously limited participation by registered holding companies, and so permit companies such as Cinergy to become vigorous competitors in the telecommunications industry, thereby promoting the public interest.[1]

Against this backdrop, we offer several specific comments with respect to the proposed rules.

---

[1] See S. Rep. No. 104-23. 104th Cong., 1st Sess. 8 (1995).

Comments

I. The rules should expressly permit a single consolidated application to be filed by, or on behalf of, one or more companies in a registered holding company, whether or not such companies are in existence at the time of the filing.

The rules should clarify that an application may be filed by, or on behalf of, an entity seeking status as an ETC. The Securities and Exchange Commission ("SEC") adopted this approach in its rules implementing the "foreign utility company" provisions of the Energy Policy Act of 1992, providing that "notification of status as a foreign utility company, may be filed **by, or on behalf of,** an entity that seeks to become a foreign utility company."[2] As discussed below, the clarification is necessary to obviate the need for SEC authorization for a company that, although not yet in existence, will be formed to engage exclusively in the permitted ETC activities.

In this regard, we recommend that the FCC make clear that an application may be filed on behalf of an entity that seeks to become an ETC, whether or not such entity is in existence at the time of the filing. The proposed rule refers to entities "which are or will be eligible companies owned and/or operated by the applicant."[3] It is unclear whether

---

[2] Rule 57 under the 1935 Act (emphasis added).

[3] As a technical matter, the reference to "eligible companies owned and/or operated by the applicant" appears to be based on an analogous provision in the rules of the Federal Energy Regulatory Commission ("FERC") implementing section 32 of the 1935 Act. See Filing and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, Order No. 550, 58 Fed. Reg. 8897 (Feb. 18, 1993), order on reh'g, Order No. 550-A, 58 Fed. Reg. 21250 (Apr. 20, 1993) ("EWG rules"). The term "eligible companies" does not appear in the definition of an ETC under section 34(a)(1) of the Act; rather, an ETC is defined as a person determined by the FCC to be "engaged directly, or indirectly, wherever located, through one or more affiliates (as defined in section 2(a)(11)(B) [of the 1935 Act]), and exclusively in the business of providing (A) telecommunications services; (B) information services; (C) other services or products subject to the jurisdiction of the Federal

the rule, as currently drafted, would permit a registered holding company to file an application on behalf of a to-be-formed entity that would be engaged exclusively in providing ETC goods and services. But if a registered holding company cannot obtain ETC certification prospectively for such entities, the registered holding company may be required to obtain SEC approval under the 1935 Act, by order upon application, to form and capitalize the entity before that entity files for ETC certification. As the FCC noted in its recent Entergy Technology order, such a requirement of "SEC pre-operations review . . . would effectively moot in major respects the purpose of the ETC provisions," a result not intended by the language, structure or purpose of the statute.[4] Following the reasoning of the Entergy Technology order, we urge the FCC to make clear that ETC status is available prospectively for an entity that will be engaged exclusively in authorized activities, regardless of whether such entity is in existence at the time of the filing.

Finally, we endorse the FCC's proposal to allow entities that are affiliates of a common parent to file a single consolidated application, thereby eliminating unnecessary filings. At a minimum, the registered holding company should be able to file on behalf of its affiliates in the registered holding company system.

Communications Commission; or (D) products or services that are related or incidental to the provision of a product or service described in subparagraph (A), (B), or (C)." Accordingly, we believe it would be more accurate to substitute "exempt telecommunications companies" for "eligible companies owned and/or operated by the applicant."

[4] Entergy Technology Co., ___ FCC Rcd ___ (FCC 96-163, Rel. April 12, 1996) ("Entergy Technology") (the FCC found that ETC status is available if an entity has been established for the exclusive purpose of providing telecommunications or other covered services).

II. The rules should expressly provide that notification of material change in facts is required only if such change calls into question the continuing validity of the sworn statement under Section 1.4002(a)(2) of the regulations.

The rules, as drafted, require notice to the FCC of any "material change in facts that may affect an ETC's eligibility for ETC status under section 34(a)(1)." We wish to clarify first that this requirement does not apply with respect to the "brief description of planned activities" under Section 1.4002(a)(1) of the regulations. It is our understanding that the description of "planned activities" is intended for illustrative purposes only.[5] The fact that an applicant may subsequently choose not to pursue the particular activities described in response to Section 1.4002(a)(1) should not affect its status as an ETC — so long as it continues to engage in other ETC-authorized activities, consistent with the representations in its sworn statement under Section 1.4002(a)(2).

Finally, to the extent it is necessary to notify the FCC of a material change, we recommend that the notification period be increased from 30 to 60 days.[6]

Proposed Changes

Accordingly, we would suggest that the bold-faced language set forth below be substituted for the corresponding text of proposed rule 4002:

(a) An application by, or on behalf of, a person seeking status as an exempt telecommunications company shall be filed with

---

[5] Again, it appears that this provision was modeled on the EWG rules. The problem arises because the definition of an ETC under section 34 of the 1935 Act is far more open-ended than that of an EWG under section 32. In particular, an ETC is defined in terms of a broad list of permissible activities, while an EWG is defined with respect to a specific "eligible facility."

[6] A 60-day period is consistent with the notification period under the EWG rules.

the Commission and served and served on the Securities and Exchange Commission and any affected State Commission, provided that a single application may be filed on behalf of all entities that are affiliates of a common holding company parent. The application shall contain the following:

(1) A brief description of the planned activities of the company or companies which are or will be exempt telecommunications companies;

(2) A sworn statement, by a representative legally authorized to bind the applicants, attesting to any facts or representations presented to demonstrate eligibility for ETC status, including a representation that the applicants **are or will be** engaged directly, or indirectly, wherever located, through one or more affiliates (as defined in section 2(a)(11)(B) of the Public Utility Holding Company Act of 1935), and exclusively in the business of providing:

(A) Telecommunications services;
(B) Information services;
(C) Other services or products subject to the jurisdiction of the Commission; or
(D) Products or services that are related or incidental to the provision of a product or service described in paragraph (A), (B), or (C); and

(3) A sworn statement, by a representative legally authorized to bind the applicants, certifying that the applicants satisfy Part 1, Subpart P, of the Commission's regulations, 47 C.F.R. Sections 1.2001, et seq., regarding implementation of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862.

We would further recommend the following highlighted changes to Section 1.4006, Procedure for Notifying Commission of Material Change in Facts:

If there is any material change in **the** facts **as set forth in the sworn statement under Section 1.4002(a)(2)** that may affect an ETC's eligibility for ETC status under section 34(a)(1) of the Public Utility Holding Company Act of 1935, the ETC must, within **60** days of the change in fact, either:

(a) apply to the Commission for a new determination of ETC status;

(b) file a written explanation with the Commission of why the material change in facts does not affect the ETC's status; or

(c) notify the Commission that it no longer seeks to maintain ETC status.

Conclusion

Again, we wish to express our support for the FCC's work in expediting and streamlining the ETC application process.